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In The
Supreme Court of the United States

THE CITY OF CUYAHOGA FALLS, ET AL.,
Petitioners,
v.
BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF ATHENS OHIO AND THE OHIO MUNICIPAL LEAGUE

GARRY E. HUNTER
Director of Law
City of Athens, Ohio
Law Administraion Bldg., Suite 301
8 Washington Street
Athens, OH 45701

Counsel for Amicus Curiae
The City of Athens, Ohio

*BARRY M. BYRON
**Counsel of Record*
JOHN E. GOTHERMAN
Interstate Square Bldg. I
Suite 240
4230 State Route 306
Willoughby, OH 44094

Counsel for Amicus Curiae
The Ohio Municipal League

August, 2002

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

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STATEMENT OF *AMICUS* INTEREST

The City of Athens, Ohio, is a municipality located in the south eastern corner of the state. The Ohio Municipal League (hereinafter "the League") is a non-profit Ohio Corporation composed of a membership of more than 750 Ohio cities and villages. All of the citizens and taxpayers of these entities have an interest in seeing the anti-discrimination and civil rights laws of this nation applied to municipalities fairly and in a manner consistent with good public policy. The Sixth Circuit Court of Appeals opinion below does not achieve this goal because it holds the City of Cuyahoga Falls liable for following existing law related to referendum procedures. The lower court's decision also holds the City liable for unlawfully discriminating, despite the absence of any evidence that any municipal official intended to discriminate against anyone. This decision adversely impacts all of the municipalities in the State of Ohio.

Accordingly, the City of Athens, Ohio, and the Ohio Municipal League have an interest in seeing the lower court's decision reversed.

QUESTION PRESENTED

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may a court inquire into the motivations of a handful of the citizens, who are not officials with the city, who expressed support for the referendum and impute those motivations to the entire municipal corporation?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against the municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?

3. Does the Due Process Clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Cuyahoga Falls, (2) the Mayor of the City, Don L. Robart, (3) the former City Engineer, Gerald Dzurilla, and (4) the former Clerk of City Council, Gregg Wagner. Respondents are (1) Buckeye Community Hope Foundation, (2) Buckeye Community Three, L.P., (3) Cuyahoga Housing Partners, Inc., and (4) the Fair Housing Contact Service.

SUMMARY OF THE ARGUMENT

1) There is no evidence of municipal intent or purpose to discriminate. Such evidence is a prerequisite to a finding of a violation of equal protection. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555 (1977) . No official action or policy by the City manifested the intent to discriminate, and the City cannot be held liable in the absence of such evidence.

2) The speculated racial animus of a minority of residents who oppose low income housing in their community cannot be imputed to the municipality, where no official municipal law or policy implements the minority's position. The application of facially neutral election law cannot be used

to impute discriminatory intent on the part of municipal officials. *See Arlington Heights*, 429 U.S. at 252; *Bd. Of County Comm'r of Bryan County Oklahoma v. Brown*, 117 S. Ct. 1382, 1394 (1997); *Monell v. Dep't of Soc. Serv. Of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2027 (1978).

3) It is contrary to the spirit and intent of the First Amendment to hold a municipality liable for the actions of a minority of the populace which exercises its rights to petition the government, thereby delaying the issuance of building permits to a property owner. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *James v. Valtierra*, 402 U.S. 137 (1971)

4) In the absence of a state recognized property right, there is no substantive due process claim. *See Bd. Of Regents v. Roth*, 408 U.S. 564 (1972). No such property right existed in this case, and the respondents are not permitted to maintain its substantive due process claim against the City. A due process claim also requires the municipal action to be arbitrary and capricious. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). The City's compliance with facially

neutral elections law and court orders in pending state court actions preclude such a finding in this case, as a matter of law.

STATEMENT OF THE CASE AND FACTS

The City of Athens, Ohio and Ohio Municipal League, *amici curiae*, hereby adopt and incorporate by reference, the Statement of the Case and Facts of the Petitioner, the City of Cuyahoga Falls.

ARGUMENT

There was No Municipal Action Evidencing Discriminatory Intent

Neither the City of Cuyahoga Falls nor any municipal official took any action which deprived any person of his or her constitutional rights. The Court of Appeals improperly inquired into the motives of a small minority of citizens, who circulated a petition, to find a basis for liability against an entire city for alleged discrimination.

This court has held:

> [O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact

is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." **Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection clause.**

(Emphasis added.) *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976)).

The City of Cuyahoga Falls did not have the requisite discriminatory intent because the actions of the Mayor, the Clerk of City Council, and the City Engineer were in compliance with the law. The City officials did not intend to discriminate based on race; their only intentions were to follow the law in carrying out their duties.

This court has identified the following objective factors that may be probative of racially discriminatory intent: (1) the racial impact of an official action, (2) the historical background of the decision, (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms, and (4) the legislative or administrative history of the decision. *Arlington Heights*, 429 U.S. at 266-67, 97 S.Ct. at 563-64.

When Buckeye expressed an interest in developing a low income housing project in the City of Cuyahoga Falls, the Mayor expressed no objections to the idea. Thereafter, Buckeye bought land and began planning the site with the City Planning Director. The City Planning Commission approved a site plan with certain conditions. One of the conditions precedent to obtaining a building permit for the housing project was to erect a fence on one side of the site.

The project was then approved by City Council in the form of Ordinance 48-1996. These are the "official actions" of the City, and all of them were favorable to the respondents. Thus, under the first prong of the *Arlington Heights* test, there was no "official action" which had an adverse racial impact.

Although the Mayor no longer supported the project, he silently approved the project by not exercising his veto power over the ordinance. The ordinance was to take effect May 2, 1996, and this was the earliest date the City could issue building permits.

Pursuant to the Charter of Cuyahoga Falls, at least ten percent (10%) citizens of the City exercised their right to petition the government and filed a referendum petition

seeking a popular vote on the Ordinance. The Charter provided that the citizens had "the power to approve or reject at the polls **any ordinance or resolution** passed by the Council." Cuyahoga Falls Charter, Article IX, Section 2 (Emphasis added).

Because the facially neutral referendum petition was timely filed and had the requisite number of signatures, the Clerk of City Council properly certified the petitions to the Summit County Board of Elections. In doing so, the Clerk of City Council was motivated solely by a desire to carry out her legal duties, not racial animus. There is no evidence to the contrary in the record.

Under Article IX, Section 2 of the Charter, the filing of the referendum petitions stayed the effectiveness of the Ordinance. Because the pending referendum prevented the issuance of a building permit, the City Engineer necessarily did not issue Buckeye a building permit. Furthermore, Buckeye had not complied with the pre-condition of obtaining the building permit, i.e. by building a fence. The City had even issued a permit for the fence before the referendum petition was filed. In light of the failure to erect the required

fence, even if the referendum petitions had not been filed, the City Engineer's refusal to issue the permits was lawful. There is no evidence in the record that the City Engineer was motivated by racial animus; he had no legal authority, at that time, to issue the permits to Buckeye. When he eventually did have such authority, the permits were issued.

Buckeye brought an action in the Summit County Common Pleas Court arguing that the referendum violated the Ohio Constitution because the Cuyahoga Falls Charter permits referenda to review "any ordinance or resolution" and does not distinguish between legislative and administrative actions. The Ohio Constitution reserves to the people the power of referendum over legislative actions. The Common Pleas Court held that people of chartered municipalities could reserve unto themselves broader referendum rights than are reserved by the Ohio Constitution. The Ohio Ninth District Court of Appeals and the Ohio Supreme Court affirmed that the referendum petition was lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). Ultimately, the Supreme Court of Ohio reconsidered the case, and held that municipal charters cannot reserve to the electorate greater powers of referendum than

does the constitution. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998).

At all times, the City obeyed the courts' orders. The City's legal obligation was to honor the judicially upheld referendum, and its preemptive effect on the City's ability to issue the building permits. These facially neutral actions cannot be deemed to subject the City to liability for discrimination.

The Sixth Circuit relied on the following statement in *United States v. Yonkers Bd. of Education.*, 837 F.2d 1131, (2d Cir. 1987):

> The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens.

Id., at 1224, cited in *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627, 634 (6th Cir. 2001).

The Sixth Circuit also cited *Hunter v. Erickson*, for the proposition:

> [T]he implementation of the majority will through referendum is not immune from judicial scrutiny since the "sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." (*Hunter v. Erickson*), 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed. 2d 616, 623 (1969); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed. 2d 313, 326 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause...") Thus, if there is evidence that residents of Cuyahoga Falls were motivated, in part, by racial bias, the City can not give effect to that bias simply because its City Charter provides for referendum.

Buckeye Community Hope Foundation v. Cuyahoga Falls, 263 F.3d 627, 635 (6th Cir. 2001).

The problem with the Sixth Circuit's analysis is that, unlike cases wherein a plebiscite may have enacted a law which is constitutionally infirm, a majority of the citizens of Cuyahoga Falls did not, in fact, deprive the respondents of anything. Ten percent (10%) of the electorate was able to delay the project, until the Ohio Supreme Court ultimately held that the referendum procedure was not appropriate for

the determination of specific property rights that had been adjudicated by non-legislative action. It cannot be forgotten that the official City action (the passage of the ordinance), was in favor of the respondents.

It is well established that a single policy maker may subject a municipality to liability under 42 U.S.C. §1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452, (1986). In this case, no City official (policy maker or otherwise) performed any action which delayed the respondents' development, other than following facially neutral state law which stays the effective date of ordinances which are the subject of referendum procedures. The minority of residents, which prevented the respondents from building their development as quickly as they would have liked, cannot be deemed to be policy makers for the City because they are neither City officials nor do they possess the power (as the minority) to impose their policy preferences on others.

It is important to note, although the Mayor expressed his concerns about the issue of "low income housing," the Mayor had the power to prevent the plan from being approved

by vetoing the subject ordinance. He allowed the ordinance to become law without his signature, thereby not exercising his legal the power to prevent the project. At all times the Mayor's actions were lawful and could not be used to impute discriminatory intent to the City.

The City and its officials had no legal authority to issue permits to Buckeye until the Ohio Supreme Court reversed itself in a 4-3 decision after one Justice changed her vote. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998) (holding that referendum petitions are limited to legislative and not administrative actions). At this time, the City obeyed the decision, and once the pre-conditions were met, the City issued the building permits. The project has since been completed.

The comments of a few citizens that could be construed as racist cannot be imputed to the City of Cuyahoga Falls to find racist intent on behalf of the City. *See Arlington Heights*, 429 U.S. at 252; *Bd. Of County Comm'r of Bryan County Oklahoma v. Brown*, 117 S. Ct. 1382, 1394 (1997) (holding in a Section 1983 action that "Congress did not

intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights"); *Monell v. Dep't of Soc. Serv. Of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2027 (1978) (holding that a plaintiff in a Section 1983 action must show that a municipality, through its deliberate conduct, was the "moving force" behind the injury alleged).

First Amendment Freedoms of Political Expression

The First Amendment protects the freedom of political speech and the right of the people to petition the Government.

Citizens of any community are entitled to express their opinions about issues concerning their community. This court has recognized the right to preserve and protect the right of referendum. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *James v. Valtierra*, 402 U.S. 137 (1971) (holding a California constitutional provision that required a referendum on all low-income housing projects to be lawful). In *Meyer*, this court recognized that the right to initiative, which is functionally the same as referendum, involved "core political speech," and the right to petition for political change and to

engage in discussions about that change "is guarded by the First Amendment." The right of the people to petition their government and to speak openly about their political views and concerns is at the heart of the First Amendment. As such, the opinions and concerns of the citizens in this case are protected by the First Amendment.

It seems contrary to the spirit and intent of the First Amendment to hold a municipality (and all of its taxpayers) liable for the expressions and the political actions of a vocal minority of the municipality's voters, particularly since the official municipal actions favored the respondents.

No Substantive Due Process Claim

The due process clause of the constitution does not require a municipal corporation to issue building permits when the underlying conditions for the issuance of the building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction.

To establish a due process claim, this court has held that a plaintiff must first establish a property interest in the thing denied. *See Bd. Of Regents v. Roth*, 408 U.S. 564

(1972). Buckeye had no property interest in the building permits at the time they were denied by the City because they had not fulfilled the pre-requisite conditions, i.e. erecting a fence. Further, the referendum, which was believed to be lawful at the time, stayed all proceedings while approval of the site plan was put to a popular vote.

Courts have held that as long as the governing body retains some discretion in denying the sought-after permit or approval, there can be no property interest subject to federal due process protection. *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992). Buckeye claims that the referendum denied them of site plan approval and the resulting issuance of building permits. Because the Charter of Cuyahoga Falls reserves discretion to the City in considering site plans, Buckeye had no property interest in the site plan approval. Therefore, Buckeye has no substantive due process claim. *See Regents* at 564; *Triomphe* at 198; *Gardner* at 63.

A due process claim also requires that the government's actions be arbitrary and capricious in the strict

sense. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). This would mean that there would have to be no rational basis for the City denying the permits. *Id.* This is not the case. The City followed the law of its Charter and three Ohio court judgments, including the Ohio Supreme Court, which held its Charter to be lawful. The City was required by law to withhold the permits because the referendum stayed the effectiveness of the site plan approval. When the Ohio Supreme Court eventually reversed itself, the City issued the permits accordingly. As such, the City acted rationally, in conformance with the law, at all times.

This court has held that due process does not guarantee that a city will never make an incorrect decision that gets overturned through litigation. *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). Respondents apparently seek to overrule *Bishop, sub silento*.

Because Buckeye had not met the underlying conditions for the issuance of the building permits, and because the permits were required withheld pursuant to the judgments of competent state courts, Buckeye had no property interest in the building permits, and therefore cannot

establish a due process violation claim against the City. For these reasons, the *amici* urge this court to reverse the holding of the Sixth Circuit.

A Facially Neutral Referendum Does Not Have a Disparate Impact

A disparate impact claim under the Fair Housing Act cannot be maintained against the City for the alleged impact of the filing of the facially neutral referendum petition, which was upheld by the courts until the Ohio Supreme Court reversed its prior determination that the referendum was permissible under the Ohio Constitution. This court has never held that a disparate impact claim can be established by the impact of a facially neutral referendum. Also, the Sixth Circuit, until this case, had not recognized such a claim. *Clarke v. Cincinnati*, 40 F.3d 807 (6th Cir. 1994); *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986). In this case, the Sixth Circuit erred by putting statutory interests above constitutional rights, creating unmanageable risks for municipalities. The City should not be punished because its citizens petitioned their government or because the City obeyed court judgments in a pending case.

CONCLUSION

The *amici* respectfully request this court to reverse the judgment of the Sixth Circuit in order to prevent a majority of the taxpayers of a municipality from being held liable for the words and actions (arguably insulated under the First Amendment) of a minority of the voters of the municipality.

Every action by the City of Cuyahoga Falls, and all of its officials, comported with the law, and no evidence supports the conclusion that the City's officials were animated by any interest other than following the law.

This court is urged to reverse the decision of the Sixth

Circuit Court of Appeals, and enter judgment on behalf of the petitioners.

Respectfully submitted,

Garry E. Hunter
Director of Law
City of Athens, Ohio
Law Administration Bldg.,
Suite 301
8 East Washington Street
Athens, Ohio 45701
(740) 592-3332
Counsel for Amicus Curiae
The City of Athens, Ohio

Barry M. Byron
Counsel of Record
John E. Gotherman
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303
Counsel for Amicus Curiae
The Ohio Municipal League